# ARTICLES

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# The New ICC Regulations on Contract Bonds

The International Chamber of Commerce (ICC) Uniform Rules for Contract Bonds[1] fall within the group of norms that the ICC has dedicated to the vast and complex world of personal guarantees. The internationalization of legal traffic and the discrepancies between various national regulations on guarantees have caused the two international institutions whose objective is to unify commercial law, the ICC and the United Nations Commission on International Trade Law (UNCITRAL), together with the collaboration of other organizations, such as the Panamerican Surety Association, the Comité Européen des Assurances, and the International Credit Insurance Association, to tackle the task of developing a uniform regulation of the various contractual guarantees.

In order to understand why the Uniform Rules for Contract Bonds came into being, it is necessary to make a brief reference to their predecessors—for each new regulation has been promulgated in order to deal with the new requirements of legal traffic by remedying the defects and loopholes of the previous regulations.

In 1964 the ICC focused its attention for the first time on the world of guarantees. A working party was set up to draft rules in which the interests of the



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1. ICC Publication No. 524.

guarantor, the principal, and the beneficiary would be taken into account, establishing each party's rights and providing defense mechanisms for the guarantors, mainly banks, against improper claims by their clients.[2] The result was the publication in 1978 of the ICC Uniform Rules for Contract Guarantees (URCG).[3] However, these rules, which were drawn up under strong pressure from the banks, soon proved to be unworkable. Not only did their wording lack clarity, they also did not allow for the so-called Demand Guarantees or Guarantees on First Demand,[4] guarantees that emerged after the Second World War and were characterized by the absolute independence of the obligations of the guarantor and the principal. Demand guarantees, in contrast to the traditional bond, did not require the default of the principal in order for the beneficiary to have the right to make a claim. Thus, the guarantor was obliged to satisfy the amount of the indemnity as soon as the beneficiary requested it.

In this regard, not only did the URCG fail to provide for the possibility that the guarantor could be obliged to pay simply on the demand of the beneficiary; they also established a rigid mechanism for claims that required the beneficiary to produce reliable proof of default (judgment, arbitration ruling, or written confirmation from the principal) in order to be able to obtain the indemnity.[5] In many cases, this mechanism created enormous delays in payment, to the extent that the guarantee entirely failed to serve its purpose.[6] In order to avoid these difficulties, the exclusion of article 9's guarantees of good performance and repayment and the express inclusion of "on first demand" clauses were, in practice, frequent. Therefore, the URCG were only partially applied.[7]

Faced with this situation, the ICC initiated a period of review of the URCG. For some time, the ICC considered the possibility of modifying the guarantees, in order to allow for demand guarantees. However, the difference between one type of guarantee and the other was so great that the ICC decided that the URCG should remain unaltered, and that new rules should be drafted to deal solely with

2. With regard to the need for these defense mechanisms, see Hjerner, *Contract Guarantees, in* INTERNATIONAL CONTRACTS AND PAYMENTS 70 (Peter Sarcevic & Paul Volken eds., 1991).

3. ICC Publication No. 325.

4. With regard to these guarantees, see Javier Camacho de los Ríos, *Interpretación de las cláusulas a primer requerimiento en los contratos mercantiles*, REVISTA DE DERECHO BANCARIO Y BURSÁTIL No. 54, at 393 (1994).

5. Article 9 of the URCG deals with guarantees of good performance and repayment.

6. Franco Bonelli, *Escussione abusiva delle garanzie bancarie a prima domanda, in* DIRITTO DEL COMERCIO INTERNAZIONALE 487 (1988).

7. The possibility of including first demand clauses was questioned from the moment at which these clashed with what was established in article 9 of the URCG. In this regard, a working document was presented to the Working Party on International Contractual Practices, which analyzed, in its 13th session (U.N. Doc. A/CN/.9/WG.II/WP.65 (1990)), questions arising out of the Uniform Bill of Demand Guarantees drawn up by UNCITRAL. The working paper deemed that when payment on first demand was an express clause in a performance guarantee subject to the URCG, the beneficiary had the right to claim the guarantee upon mere request, because this clause of a special nature—that of claim on first demand—prevailed over the general clauses printed in the guarantee contract (U.N. Doc. A/CN/.9/SER.A/(1990)).

the demand guarantees.[8] After several drafts and reviews, the ICC Uniform Rules for Demand Guarantees (URDG)[9] were adopted on December 3, 1991. The drafting of the URDG was influenced enormously by the banking sector, to the extent that the working party was formed from members of the Commissions on Banking Technique and Practice and on International Commercial Practice. The wording of the drafts was inspired by the Code of Practice for Guarantees and Securities on First Demand, drawn up by the Banking Commissions of London and Scotland. The URDG were intended, along with the URCG, which remained in force,[10] to constitute a comprehensive and uniform regulation of guarantee contracts.

The new situation fully satisfied the banks, who were assiduous users of demand guarantees, but not the insurers. The Uniform Rules of the ICC, which had been drawn up behind the insurers' backs, did not take into account the particular needs of the insurers and were not adaptable to the insurers' particular activities. Today an insurance company can issue guarantees regardless of the discussions about the legal nature of credit insurance, the means by which insurers carry out their guaranteeing activity.[11] However, the banks and insurers have very different ways of operating in this area.

Banks, when giving a guarantee, basically look at the economic solvency of the assured or principal, paying less attention to its capacity to perform the contract itself. Banks wish to avoid having to argue with a beneficiary over the basis of its claim, that is, whether there was performance or not, and prefer to pay without more ado, afterwards charging this payment to the principal's account. In this way, they succeed first in improving their image of efficiency and seriousness, and second, in avoiding the inconvenience of having to open and maintain a department dedicated to investigating and verifying the circumstances of any default. For all these reasons, banks have been the main promoters of independent guarantees, by including "first request" clauses in bonds issued by them.

On the other hand, when insurers give guarantees, although they do not ignore the solvency of the principal, they pay more attention to the principal's capacity to perform the contract. Moreover, even though insurance companies issue bonds for the purpose of guaranteeing a contract, such bonds are actually insurance contracts, and as such, are subject to insurance techniques. The risk covered by them is precisely the default. The credit insurers therefore usually have departments that specialize in analyzing the principal's capacity to perform, and in

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8. As a complement to the URCG, the ICC published the contractual models for these guarantees in 1982. ICC MODEL FORMS FOR ISSUING CONTRACT GUARANTEES.

9. ICC Publication No. 458.

10. On various occasions, however, the ICC stated that the URDG would substitute for the URCG, e.g., in the introduction to the 1990 draft of the URDG.

11. *See* Luis Angulo-Rodríguez, *Panorama de encuadre de la garantías personales atípicas*, REVISTA JURÍDICA DEL NOTARIADO No. 7 (1993); JAVIER CAMACHO DE LOS RÍOS, EL SEGURO DE CAUCIÓN: ESTUDIO CRÍTICO (1994) [hereinafter EL SEGURO].

determining whether default took place. Naturally, insurers are extremely interested in deciding whether the insured event has taken place, and consequently, whether they are obliged to pay. This interest explains why, unlike banks, insurers are not particularly keen on demand guarantees, and instead remain supporters of the traditional accessory guarantees, whereby the guarantor's liability is triggered by the principal debtor's default.

Accordingly, it is easy to understand why the situation created by the URCG and the URDG did not satisfy insurers. The URDG, as already indicated, were basically intended for banks. On the other hand, the rigidity of the URCG regarding proof of default made them somewhat ineffective and unworkable. Faced with these circumstances, the board of the Tokyo Marine & Fire Insurance Company suggested to the ICC Insurance Commission in 1990 that some new uniform rules for conditional guarantees be drafted that take into account insurance techniques and principles. For this purpose, a working party was set up, consisting of experts on guarantees and international law. With the support of the main insurance associations, the working party formulated a first draft. The ICC showed an interest in the project, and the Commissions on Banking Technique and Practice on International Commercial Practice also became involved. The Uniform Rules for Contract Bonds resulted from their work.

## I. Legal Analysis of the Uniform Rules for Contract Bonds

### A. Scope and Application

According to article 1(a), the Uniform Rules for Contract Bonds (the Rules) shall apply to any bond that states that the Rules so apply, or that otherwise incorporates them by reference. For such purposes, it shall suffice that the bond incorporates a reference to the Rules and the publication number. Thus, in order for these Rules to apply, either their entire content should be included in the bond or a simple reference should be made to them.

However, as indicated in paragraph (b) of the same article, even when reference is made to the Rules in a bond, their application is limited when any of their aspects is incompatible with what is provided in the bond or with the mandatory provisions of the applicable law regulating the bond. In these circumstances, and in relation to the part of the bond that is incompatible with the Rules, the provisions of the bond or the mandatory provisions of the applicable law will prevail, depending on the particular case.

With regard to the first supposition, the fact that the provisions made by the parties to the bond are given preference suggests that the contracting parties not only may use the Rules, but may also introduce variations to them. Thus, the parties should not have to use the Rules in their entirety, but rather may do so in part. With regard to the second supposition, the Rules do not constitute regulations that would exclude the law that would normally apply in each case. To the contrary, they constitute a model for the content of a contractual bond and, as such, may only modify the applicable legislation that is nonmandatory, their application necessarily being subject to provisions of a mandatory nature. A different problem is that of determining which provisions of applicable law regarding bonds have a mandatory nature, the answer depending on national principles and jurisprudence.

## B. Legal Nature of the Guarantee Formulated by the Rules

### 1. *Accessory Nature*

The Rules formulate a bond that basically has an accessory nature. This accessory nature means that the bond is closely linked to the contract under guarantee and that the liability of the guarantor likewise will be so related, but this liability cannot exceed the liability that the principal has in the contract. This provision is expressly stated in the introduction to the Rules, and can also be concluded from considering the Rules as a whole. In particular, article 3(b) states that "[t]he liability of the Guarantor to the Beneficiary under the Bond is accessory to the liability of the Principal . . . and shall arise upon Default." This accessory nature has the following consequences:

(a) According to article 7(i)(i), the guarantor will only be obliged to meet a claim if the principal defaults. Thus, the bond devised by these Rules clearly differs from so-called demand guarantees, to which the ICC has dedicated other Uniform Rules. With demand guarantees, the guarantor must pay the amount of the indemnity on the mere request of the beneficiary and without making any kind of investigation on whether default by the principal of the guarantee has taken place.

Moreover, in order to facilitate the claims procedure, the Rules themselves establish a series of mechanisms to determine default. These mechanisms aim to avoid the delays and problems derived from any lack of agreement between the beneficiary and the principal regarding whether default has taken place. However, the fact that the systems of proof of default may be simplified does not mean, as some believe, that the bond loses its accessory nature.

(b) The liability of the guarantor depends directly on that of the principal in the contract. Thus, the guarantor will be liable only in cases in which the principal would be liable, and, subject to the bond amount (to which we refer again later), the amount of the indemnity to be satisfied by the guarantor will never exceed that which the principal would have had to pay.

Since the guarantor will only be liable in cases in which the principal would be liable, a problem may arise in the case of fortuitous default[12] where the Rules make no reference to it. In this regard, some legislation, such as the Spanish legislation, determines that, except where the law or the obligation has expressly provided for it, nobody should be liable for unforeseeable events or those that,

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12. Concerning the problem of liability that arises in the case of fortuitous default, with respect to a bond's accessory nature, see El Seguro, *supra* note 10, at 51ff.

although foreseeable, were unavoidable. Under such legislation, the principal will not be liable for any fortuitous default that is not its fault (except if otherwise agreed). Consequently, and by virtue of the bond's accessory nature, the guarantor cannot be held liable either.

However, the Rules do not clearly confirm this solution. In article 7, paragraph i, the Rules limit themselves to indicating that the claim will be honored if there was a "default," almost certainly an erroneous term. As has been pointed out,[13] default from the creditor's (beneficiary's) point of view is equivalent to a complete failure to perform, independent of the causes or circumstances in which it occurred. However, from the point of view of the debtor (principal), default will only be that for which it is responsible, thus excluding fortuitous circumstances.[14] For all these reasons, in the interests of these bonds being more flexible and in order to avoid the problems that may arise in establishing default (the primary purpose of these Rules), guarantors should include a clause in the bond that expressly excludes their liability in fortuitous cases.

Since the amount of the indemnity to be satisfied by the guarantor will never exceed that which the principal itself must pay, one should note that the Rules do not conceive the indemnity as a fine or sanction that must be paid as a result of the default. Rather, this amount should coincide with the loss and damage actually suffered (the indemnity or financial remedy derived from the default in question), taking the amount fixed in the bond as a maximum. Thus, the bond amount acts as a maximum limit to the total liability of the guarantor.

13. Manuel Olivencia-Ruiz, *Seguros de crédito, caución, responsabilidad civil y reaseguro, in* COMENTARIOS A LA LEY DE CONTRATO DE SEGURO 876ff (Evelio Verdera-Tuells ed., 1982). The question of whether we find ourselves in a force majeure situation, or a fortuitous one, also raises problems. As has been pointed out, this question is particularly problematic in credit insurance contracts that cover risks in countries that are unstable for political reasons. Jean Bastin, El riesgo político en el campo de las fianzas y garantías, XIII General Congress of the Panamerican Surety Association, Puerto Rico (Apr. 1994).

14. If we consider Spanish legislation, which will normally be of subsidiary application, but with regard to mandatory regulations will take priority over the Rules, this question does not seem to be clearly resolved. Thus, with regard to article 1826.1 of the Spanish Civil Code, which establishes that "the guarantor may be obliged to pay less, but not more than the principal debtor, both with regard to the amount and onus of the conditions," and on the basis that the guarantor's liability could be excluded in fortuitous cases, we are faced with the following:

First, the Supreme Court has, on occasion, admitted such a liability of the guarantor. Such is the case of the Supreme Court ruling of July 30, 1991, ref. aranzadi no. 5425, which, in relation to a credit insurance, ordered the insurance company to pay even when it had already been acknowledged that the default of the principal was fortuitous.

Second, with regard to the interpretation of article 1826.1, legal opinion considers this article to exclude any bond contracted under more onerous conditions (*in duriorem causa*) than the principal obligation, but not those bonds contracted with a higher degree of responsibility for performance of the obligation than the principal obligation. This leads one to wonder whether the fact that the guarantor should be liable in cases of fortuitous default, when the principal is not, is not simply a case of a bond contracted with a higher degree of responsibility than the principal obligation and, as such, perfectly admissible.

Third, fairly often credit insurance policies expressly exclude coverage for fortuitous risks.

(c) Another consequence of the bond's accessory nature is that, if the guarantor refuses to satisfy a well-founded claim, it will be obliged, except if agreed to the contrary, to satisfy both the interest accrued since the claim was made and the costs of the trial since the guarantor received formal demand for payment from the beneficiary.

(d) Lastly, a novel possibility exists that is linked closely to the accessory nature of the guarantee: if so provided, the guarantor may, in the case of default by the principal, perform the obligation that the latter failed to perform, instead of making monetary compensation for the loss. This possibility is analyzed more thoroughly later in this article.

#### 2. *Subsidiary Nature*

Even though not expressly stated in the Rules, the bond regulated by the Rules does not appear to have a subsidiary nature, to the extent that the only element required for the beneficiary to be able to make a claim is that default has occurred, and that the claim has been made in accordance with certain requisites. The beneficiary does not have to have made a previous claim against the principal. Moreover, this joint liability coincides with international practice in which it is even fairly common for the beneficiary to demand performance directly from a bank in the beneficiary's country.

### C. Form of the Bond and Effective Date

Every bond must set out the following: the principal; the beneficiary; the guarantor; the contract; the bond amount; the date the bond becomes effective; the expiration date; and the names, addresses, telex and/or fax numbers, and contact references of the beneficiary, guarantor, and principal. In addition to this information, and in order to ensure that certain effects do or do not take place, the parties will need to take particular care to include some express provisions. Given the importance of such provisions, we highlight them within each topic and also provide a summary at the end of the article.

### D. Liability of the Guarantor to the Beneficiary

As we have indicated, the main characteristic of the bond formulated by the Rules is its accessory nature. This accessory nature is set forth in article 3(b), which also establishes that "[t]he Contract is deemed to be incorporated into and form part of the Bond." Therefore, the liability of the guarantor, which requires the principal's default, will be based on the liability of the principal. One can also conclude that the loss and damage (or the indemnity) that must be paid by the guarantor shall be that which was actually suffered, that is, the same as that which the principal would have had to satisfy. Any interest that the guarantor has to pay in the case of unjustifiably refusing to meet the claim of the beneficiary is logically excepted. However, in addition to the limit fixed by the loss and damage actually suffered, the liability of the guarantor also has other limits.

Before making reference to such limits, a very important point must be highlighted. As indicated above, the Rules consider the contract to be an integral part of the bond. Thus, it may be deduced that, in principle, the bond covers all the obligations for which the contract makes the principal liable. This principle is also shown by the Rules' definition of "the Contractual Obligation" as "[a]ny duty, obligation or requirement imposed by a clause, paragraph, section, term, condition, provision or stipulation contained in or forming part of a Contract or tender."

Nevertheless, a bond possibly may only be required in relation to one part of the contract, such that the guarantor will not be liable for every default relating to the contract, but only to those defaults relating to the obligation that the bond specifically covers. This notion is relatively common in complex contracts in which a bond may be required only in relation to the supply, construction, or performance of a component or part of the works. In these cases, the parties should be particularly careful when drafting the text of the bond, clearly identifying the obligations that they wish to be guaranteed. If they do not do so, the guarantor will be deemed to be required to meet all those obligations that derive from or are related to the contract.

Having made this important proviso, this article now looks at other circumstances that may limit the liability of the guarantor. First, taking into account that the contract is deemed to form an integral part of the bond, any of those circumstances that may affect the liability of the principal naturally will also affect that of the guarantor. Thus, the guarantor may raise any defense against the beneficiary that is available to the principal pursuant to the contract, and logically, any defense that derives from the bond itself. Article 3(d) refers to this possibility, stating that any defense, remedy, cross-claim, or counterclaim that would be available to the principal pursuant to the contract, or in respect of the subject matter thereof, will be available to the guarantor against the beneficiary, in addition to and without limiting any defense under or arising from the bond. Regarding the defenses that the principal may have against the beneficiary, although the Rules do not so provide, it is understood that defenses purely personal to the principal cannot be raised by the guarantor. One defense that derives from the bond itself occurs when the beneficiary has not observed the requirements provided for by the Rules regarding the procedure for making the claim.

Second, even when the loss and damage actually suffered provide a quantitative limit to the guarantor's liability, that liability may also be limited by the bond amount fixed, an amount that, as pointed out above, does not constitute a sanction or a fine, but is the maximum limit that the guarantor is obliged to satisfy. This amount is subject to a reduction in various cases.

According to article 3(c), the amount will be reduced when the bond or contract provides for a reduction in the amount if the principal has partially performed the contract or any of the contractual obligations. An example would be where the parties stipulate that on the issue of a certificate of maintenance, or of partial performance by the principal, the amount of the bond should be reduced. In this instance, the bond amount will be that amount originally stated, subject to the corresponding variation. If a reduction in the bond amount is not provided for, partial performance of the contract or of any of the contractual obligations by the principal will not lead to any reduction in the liability of the guarantor, and the bond amount originally agreed upon will constitute the limit.

According to article 6(c), the bond amount will be reduced when the beneficiary, principal, and the guarantor so agree. Such agreement must be in writing and must be duly signed or executed by the authorized representatives of the parties.

According to article 2, the bond amount may be reduced when the guarantor has made a payment. If the guarantor meets a claim for a sum lower than the total bond amount, then, except where the parties have agreed on the definitive discharge of the bond and the release of the guarantor, the bond will remain in force for an amount equal to the original amount, less the amount of the payment made. This reduction in the bond amount, which cannot be considered a result of its accessory nature, does not really constitute a reduction in the liability of the guarantor.

In conclusion, the liability of the guarantor, which presupposes the default of the principal, is limited by three factors: (1) the loss and damage actually suffered by the beneficiary or the indemnity that must be paid to the beneficiary; (2) the circumstances of both the contract and the bond that may give rise to defenses available to the guarantor against the beneficiary; and (3) the bond amount (with its variations) that determines the maximum amount that the guarantor must satisfy.

## E. Release and Discharge of the Guarantor's Obligations to the Beneficiary

Now that the factors that limit the guarantor's liability have been considered, this section analyzes the release and discharge of the guarantor's obligations. Various situations may give rise to such discharge.

### 1. *The Expiration Date Is Reached*

The arrival of the date that has been fixed as the expiration date is a very important reason for releasing the guarantor from its obligations. This date is also especially important for the beneficiary, which must always make any claims it has against the guarantor within the time limit.

The Rules offer various possibilities for fixing the expiration date. First, the parties may establish the expiration date by including it in the bond. This case is the most common, in which the contracting parties themselves, when drafting the bond, stipulate the expiration date. The date will often have been chosen to coincide with the time limit fixed for performance of the guaranteed obligations. The date may be defined by stating a specific date or by relating it to a particular act such as the delivery of a certificate of performance (the date of issue of the certificate considered as the expiration date). Also, if an extension of time for the performance of the guaranteed obligations has been provided for in the contract, a similar extension commonly will be given in the bond in relation to the expiration date.

Second, in the case in which the parties have not established the expiration date in the bond, the Rules set out a series of norms for fixing it. In particular, one general norm and one specific norm are established, applicable to certain types of bonds. Logically, both of them are subject to exclusion by agreement.

As a general norm, and provided that no agreement to the contrary exists, article 4(a) states that "the Expiry Date shall be six months from the latest date for the performance of the Contract or the relevant Contractual Obligations thereunder, as the case may be." The fact that the expiration date of the bond is determined from the latest date for the performance of the guaranteed obligations will not raise problems if the contract fixes this date. The problem will arise when no limiting date has been provided for in the contract for performance of its obligations. In such cases it will be necessary to look to the legislation applicable to the contract. Problems may be created, not only because of the differences existing between the practices of different countries, but also, more importantly, because some countries' legislation grants an extremely long time limit (up to fifteen years) to the debtor for the performance of its obligations.

Article 4(b) also contains a series of specific rules applicable to certain types of bonds in the case where no expiration date has been stipulated:

(1) *Advance Payment Bonds.* Article 2 defines advance payment bonds as those in which the guarantor guarantees the repayment of the total sum or sums advanced by the beneficiary to the principal before the carrying out of works, the performance of services, or the supply or provision of any goods pursuant to such contract. According to article 4(b)(i), the expiration date of such bonds is the date on which the principal has carried out the works, supplied the goods or services, or otherwise performed its contractual obligations for a certified value or a value otherwise determined pursuant to the contract, as equal to or exceeding the bond amount.

(2) *Maintenance Bonds.* Article 2 defines maintenance bonds as those in which the contractual obligations relating to the maintenance of works or goods following their physical completion or provision thereof pursuant to a contract are guaranteed. According to article 4(b)(ii), the expiration date is six months from any of the following dates: (a) expiration date for the principal's maintenance obligations has been stipulated in the contract then from that date; or (b) if no expiration date for the principal's maintenance obligations has been stipulated,

but a defects liability period has been established in the contract, then from the end of that period; or (c) if neither of the stipulations contained in the previous paragraphs has been included, then the six months will be taken from the last day of the warranty period provided by the applicable law.

Even when a time limit of six months is established from the dates indicated, in order for a right to make a claim to exist, the default of the maintenance obligation must occur either while the maintenance obligation is in force, within the defect liability period, or within the warranty period. Once these periods have passed, the beneficiary has a time limit of six months to make the appropriate claim.

(3) *Retention Bonds.* According to article 2, retention bonds secure payment of the total sum or sums that the beneficiary pays or releases to the principal prior to the date of payment or release contained in the contract. The expiration date will be six months from the date stipulated in the contract for the payment, repayment, or release of any retention monies.

(4) *Tender Bonds.* Article 2 defines tender bonds as those bonds that, in respect of a tender, secure the payment of any loss or damage suffered by the beneficiary because the principal failed to enter into a contract, or to provide a performance bond or other bond pursuant to such tender. The expiration date will be six months from the latest date established in the tender documents or conditions for the submission of tenders.

Third, regardless of whether the parties have fixed an expiration date, nothing prevents the beneficiary, principal, and guarantor from agreeing at any time to modify or fix one later. This ability is deduced from article 6(c), which states that any variation must be made in writing and signed by the authorized representatives of the three parties.

One may infer from the preceding discussion that the fact that an expiration date has not been fixed in the bond may, in some cases, cause complications if later it must be determined. Thus, contracting parties, at the time of drafting the bond, should be particularly careful in fixing an expiration date.

Once the expiration date is reached, article 4(d) states that the obligation of the guarantor shall be discharged absolutely, regardless of whether the beneficiary returns the bond to the guarantor. Naturally, the cases in which the beneficiary makes a claim before the expiration date, in accordance with the requirements and formalities established in the Rules, are excepted from release. In this regard, while for the guarantor the expiration date is the date that releases the guarantor from its obligations, for the beneficiary the expiration date is the time limit for making a valid claim.

### 2. *Release Authorized by the Beneficiary*

Independent of the expiration date in the bond, the bond itself may be canceled at any time by agreement between the parties (guarantor and beneficiary), thus releasing the guarantor prior to the expiration date. Article 4(e) states that

> Notwithstanding the provisions of paragraph (d) of this Article 4, the Bond may be cancelled at any time by the return of the Bond itself to the Guarantor or by the service upon and delivery or transmission to the Guarantor of a release in writing duly signed by an authorised representative of the Beneficiary, whether or not accompanied by the Bond and/or any amendment or amendments thereto.

### 3. *Settlement of the Beneficiary's Claim*

Naturally, the liability of the guarantor will also be discharged when payment is made, that is, when the beneficiary's claim is satisfied. As indicated when discussing the factors that determine the liability of the guarantor, it may have only partially met the claim. In such cases, its liability will not be discharged, but the bond amount will be reduced. In both cases, the payment made to the beneficiary, with the consequent release of the guarantor or reduction in the amount, must be communicated to the principal.

Once the guarantor has been released from its obligations, article 5 indicates that the bond must be returned to the guarantor. The retention or possession of the bond following such release or performance will not confer any right or entitlement upon the beneficiary.

## F. Amendments to and Variations of the Contract and Bond

### 1. *Amendments to the Bond*

According to article 6(c), "[a]ny amendment to a Bond . . . shall be in writing duly signed or executed by authorised representatives of each of the Beneficiary, the Principal and the Guarantor." At first sight, this article may seem strange, as it requires the agreement not only of the guarantor and the principal, but also of the beneficiary, to any variation or amendment of the bond. This requirement is so even though, when granting the original bond, only the participation of the first two parties was necessary. However, one must consider that from the moment the bond takes effect, a series of rights of the beneficiary come into being. The case may arise, albeit infrequently, in which a variation of the bond may affect such rights (for instance, the expiration date being brought forward or a reduction being made in the bond amount). For this reason, the ICC working party considered it opportune to require the beneficiary to be a party to any amendment to the bond.

Bearing in mind that this provision has been established for the exclusive benefit of the beneficiary (who is not a party to the granting of the bond), it would be interesting to know whether, when the bond is issued, this article could be excluded by agreement between the original parties (principal and guarantor).

### 2. *Amendments to the Contract or Underlying Legal Relationship*

In relation to any variations of the contract, article 6 contains two different rules. One of them (article 6(a)) is of general application, while the other (article 6(b)) is limited to the amendments that may occur, in relation to a tender bond, to the original conditions of the tender.

Article 6(a) indicates that "[t]he Bond shall, subject to the Bond Amount and the Expiry Date, apply to the Contract as amended or varied by the Principal and the Beneficiary from time to time." On the other hand, article 6(b) establishes that

> A Tender Bond shall be valid only in respect of the works and the contract particulars set out or described in the tender documents at the Effective Date, and shall not apply beyond the Expiry Date or in any case where there shall be any substantial or material variation or amendment to the original tender after the Effective Date, unless the Guarantor shall confirm, in the same manner as set out in paragraph (c) of this Article 6, that the Tender Bond so applies or the Expiry Date has been extended.

As can be seen, each case requires that different criteria be followed. Paragraph (a) of article 6 establishes the continuance of the bond and accordingly, the liability of the guarantor, even when the principal and the beneficiary introduce amendments to the underlying contract. On the other hand, in the case of a tender bond, if amendments to the original tender occur, in order for the bond to remain valid, the guarantor must confirm such amendments by means of a variation of the bond. This variation will have to be made in the form provided for by paragraph (c) of article 6 regarding amendments to the bond.

Article 6(a) gives a rather strange solution to the case of an amendment to the contract. Surprisingly, any variation that the beneficiary and principal make automatically affects the guarantor when, in order to make an amendment to the bond, all three must agree. The bond formulated by the Rules seems to be intended to provide a solid protection of the beneficiary's interests.

In any event, this solution still raises problems, as much legislation provides that any alterations to the underlying relationship will discharge the bond and, consequently, the liability of the guarantor. For example, this is the case with article 1851 of the Spanish Civil Code, which establishes that "[a]ny extension granted to the debtor by the creditor without the consent of the guarantor discharges the bond." This provision first makes it necessary to question whether these laws have a mandatory or nonmandatory character; if they are nonmandatory, the parties to the bond (especially the guarantor) must bear in mind that, if subject to the Rules alone, the bond and the liability of the guarantor will continue to be effective even when the circumstances of the contract are varied.

Thus, if the parties (especially the guarantor) do not wish the liability of the guarantor to remain unchanged despite any variations in the underlying relationship, they must expressly exclude the application of article 6(a).[15] Similarly, with regard to tender bonds, nothing prevents the provisions of article 6(b) from being

15. It would also be interesting, taking into consideration that a high percentage of contractual bonds are issued by insurance companies, to know whether the fact that a bond is subject to the Rules, art. 6(a) not having been excluded, should be interpreted as a tacit waiver by the insurer of the right to rescind the contract included in article 12 of the Ley de Contrato de Seguro [Insurance Contracts Act].

excluded by agreement. Thus, the continued liability of the guarantor, even when any variations in the tender are made, may be stipulated in the bond.

## G. Submission of Claims and Claims Procedure

### 1. *Requirements for Submission of Claims*

Notification of a claim must be given in writing before the expiration date. In particular, article 7(a) states that the notification must be given by no later than "the close of the Business Day at the Guarantor's principal place of business set out in the Bond, on the Expiry Date." When is the notification considered as having been given? In this regard, the Rules provide for various cases.

Any claim made by authenticated teletransmission or any other equivalent tested electronic data interchange (EDI), according to article 2, will be considered to be in writing. According to article 7(b), the claim shall be deemed to be received on the arrival of such transmission. In these cases, the beneficiary also will be obliged, pursuant to article 7(e), to send a copy of the claim to the guarantor by mail.

A claim presented at the guarantor's principal place of business as set out in the bond shall be deemed to have been served, according to article 7(c), on the date on which such delivery took place, subject to proof of delivery. A claim served by mail shall be deemed to have been served, according to article 7(d), when it is actually received by the guarantor, subject to satisfactory proof of delivery.

Article 7(f) requires that the claim contain: (1) brief details of the contract, in order to identify it; (2) a statement that a breach or default has occurred, together with the circumstances in which it arose; and (3) a request for payment, performance, or execution.

### 2. *Claims Procedure: Requirements for Payment*

According to article 7(g), upon receiving a claim from the beneficiary, the guarantor shall send notice in writing to the principal of such claim as soon as reasonably practicable and before making any payment or performing any obligation under the contract. Additionally, according to article 7(h), the guarantor may request any information relevant to the claim from the beneficiary, which is obliged to allow the guarantor and its employees, agents, or representatives to inspect the works, goods, or services carried out or supplied by the principal.

The guarantor is obliged to inform the principal of any claim made by the beneficiary. Moreover, the guarantor may request any information relevant to the circumstances of the performance of the contract or of the guaranteed obligations. This provision is perfectly reasonable because the principal is best able to inform the guarantor both of the circumstances of its actions and of any defenses it may have against the beneficiary. This information is of particular interest to the guarantor since the guarantor may raise any defenses against the beneficiary that the principal has. Moreover, the principal may raise such defenses against the guarantor when it exercises its action for recovery, if the guarantor has failed to take advantage of them.

There must be a default in order for a claim to be recoverable. In addition, the claim must have been made in accordance with paragraphs (a)-(g) of article 7. The fact that the default of the principal constitutes a necessary ground for giving the beneficiary the right to claim payment is totally logical, if one considers the accessory and conditional nature that the Rules give the bond. In this respect, contractual bonds are completely different from demand guarantees, because with the latter it is enough that the claim is presented in the correct way—no other requirement relating to the contract or its underlying obligations is necessary.

### 3. *Determining Default*

As the greatest problem arising out of the URCG was precisely that of demonstrating and proving default, the Uniform Rules for Contract Bonds have opted for establishing a series of mechanisms that tend to facilitate the determination of default. These mechanisms are therefore one of the most important aspects of the Rules. In particular, the Rules provide for three systems.

#### a. Certificate of Default Issued by a Third Party

Article 7(j)(i) indicates that default will be considered as established "upon issue of a certificate of Default by a third party (who may without limitation be an independent architect or engineer or a Pre-Arbitral referee of the ICC) if the Bond so provides and the service of such certificate or a certified copy thereof upon the Guarantor. . . ." Regarding this procedure for fixing default, one can deduce from the rule that the procedure's application will depend on the parties' expressly providing for it. Thus, if the parties wish default to be established by a third party, they will have to so state in the bond. The parties not only must state that the bond is to be subject to the system, but the parties also must actually nominate the third party in the bond. If they do not do so, default will be fixed according to the provisions of subparagraphs (ii) and (iii) of article 7(j).

Article 7(j)(i) makes reference to an independent architect or engineer or a pre-arbitral referee of the ICC. Naturally, such reference is merely given as an example, the parties being at liberty to choose the third party. In principle, the certificate of the third party only has to establish default, that is, the fact that default has taken place. If, once default is established, differences exist between the guarantor and the beneficiary regarding the amount of the loss and damage suffered, the parties will need to go to court, thus losing the speed that the system offers. In order to avoid this problem, and although the rules do not expressly provide for it, nothing prevents the parties from giving the third party an additional power to evaluate the damages suffered by the beneficiary and, consequently, the indemnity to be satisfied by the guarantor. Evidently, the bond should also contain an express provision stating that the parties wish the third party to evaluate the amount of the default as well.

b. Certificate of Default Issued by the Guarantor Itself

Article 7(j)(ii) states that the default shall be deemed to be established "if the Bond does not provide for the issue of a certificate by a third party, upon the issue of a certificate of Default by the Guarantor." In contrast to the certificate being issued by a third party, which will only take place if it has been expressly provided for, the issuance of a certificate by the guarantor is the default system provided by the Rules except where expressly excluded. Thus, if the parties do not provide for a certificate to be issued by a third party, they will have to decide whether they wish to exclude the application of this paragraph. If they do not exclude it, the guarantor will be able to issue a certificate of default. The main aim of this provision is to give the guarantor the opportunity of paying the claim quickly in the event that the principal disputes the claim without any grounds for doing so, purely for the purpose of delaying.

This system reflects the fact that the Rules were drafted with the insurers in mind, since, because of the way they work, they are in a position to analyze and verify the default of the principal.

Both in the case of the issue of a certificate by a third party and in the case of its issue by the guarantor himself, article 7(k) states that the guarantor will have to deliver a copy of this certificate to the principal and to the beneficiary.

c. Default Established by a Final Judgement, Order, or Award of a Court or Tribunal of Competent Jurisdiction

This third possibility is established for the cases in which neither the certificate issued by a third party (because it is not provided for) nor the certificate issued by the guarantor (because it has been expressly excluded) applies.

However, when one of the two systems of certificates has been elected, the certificates' aim is to establish default for the sole purpose of the claim, and to settle the relationships between the guarantor and the beneficiary; that is, they will allow a speedy payment to the beneficiary when it has made a proper claim. However, the certificates are neither definitive nor conclusive, meaning that once payment is made, any dissatisfied party will still have the chance to settle its differences in relation to the performance of the contract by applying to the competent jurisdiction.

In conclusion, both the issue of the certificate of default by a third party and its issuance by the guarantor itself lead, in practice, to facilitating the payment of the guarantee. Nevertheless, in spite of the issue of these certificates, the guarantor may be aware of the existence of exceptional circumstances that make it advisable to refuse payment. However, this situation will occur only in exceptional cases.

In most cases, the guarantor will pay upon presentation of the certificates since, on the one hand, the existence of a certificate indicates that the claim of the beneficiary is well-founded, and on the other hand, the guarantor will run the risk of having to pay interest and legal costs if the claim is later resolved judicially. Finally, if the claim of the beneficiary is not satisfied when a well-founded claim has been properly presented, the guarantor's professional image would undoubtedly be damaged. For all of these reasons, such procedures are intended to achieve rapid payment and avoid depending on a court ruling that may take a long time, or on the collaboration of the principal, which, for obvious reasons, will be reluctant to acknowledge its default.

This desire for claims to be resolved quickly is also encouraged by article 7(1), according to which the guarantor must consider every claim expeditiously. In the cases where the guarantor rejects the claim, notice must be given immediately to the beneficiary by means of teletransmission. Such notification must be confirmed by letter, setting out the grounds for such refusal.

#### 4. *Substitution in Performance*

As pointed out at the beginning of this article, one of the most novel aspects of these Rules is the possibility that, when a default by the principal occurs, the guarantor may choose between paying the corresponding indemnity to the beneficiary and performing the contract instead of the principal. If the guarantor wishes to enjoy the benefit of this choice, such a provision must be expressly stated in the bond. This solution, which benefits both the guarantor and the beneficiary, is common practice in several countries.

### H. Jurisdiction and Settlement of Disputes

#### 1. *Applicable Law*

According to article 8(a), the applicable law shall be the law of the country chosen by the parties to govern the operation of the bond.[16] If the parties have not expressly made the bond subject to a particular law, the Rules establish, with good criteria, that the applicable law will be that which governs the underlying contract. If the parties have not stated anything to the contrary, the bond and contract guaranteed should be governed by the same legislation, thus avoiding the consequence of two different legal systems being applied, which could lead to differences arising between the liability of the principal and that of the guarantor.

16. This provision follows the view that the contractual guarantees are included within the framework of contractual relationships in which the parties may freely elect the law applicable to them. *Cf.* M. Pelichet, *Garanties bancaires et conflits de lois*, 3 Revue de Droit des Affaires Internationales 338 (1990). The URCG and URDG are expressed in the same terms.

2. *Procedure for the Settlement of Disputes*

Article 8(b) declares that any dispute that arises between the parties in relation to the bond shall be settled, unless otherwise agreed, by arbitration in accordance with the ICC Rules. Thus, if the parties are subject to the Rules alone, without establishing any other mechanism for resolving their differences, the dispute will be settled by arbitration. The problem is in deciding whether the applicable law permits the parties to make themselves subject to arbitration by simple reference or whether, to the contrary, they must expressly so state.

In the case in which the parties have expressly excluded arbitration and have not established the form by which to resolve their disputes, article 8(c) states that:

> [A]ny dispute between the parties to the Bond shall be determined by the courts of the country nominated in the Bond, or, if there is no such nomination, the competent court of the Guarantor's principal place of business or, at the option of the Beneficiary, the competent court of the country in which the branch of the Guarantor which issued the Bond is situated.

## I. Memorandum of the Provisions that the Parties Should Stipulate in the Bond

In addition to the stipulations referenced at the beginning of this article (principal, beneficiary, names, addresses . . .), this article now briefly reviews some other clauses that the parties should specify if they wish certain effects to occur or not:

If the bond is only required in relation to part of the contract, such that the guarantor will not be liable for every default relating to the contract, but only for that relating to certain obligations, then the parties must clearly specify and identify the contractual obligation or obligations to be guaranteed. If they do not do so, the guarantor will be deemed to be responsible for all defaults that derive from or are related to the contract.

In relation to the defenses derived from the bond that the guarantor may raise against the beneficiary, although the Rules do not expressly say so, and even though it is becoming common practice by insurers, the parties should insist that the bond expressly state the guarantor's waiver of his right to require the beneficiary to first execute on the principal's property. Only in this way can the bond regulated in the Rules be effective, a circumstance on which their future application will most certainly depend.

In relation to the liability of the guarantor, article 6(a) establishes that "[t]he Bond shall, subject to the Bond Amount and the Expiry Date, apply to the Contract as amended or varied by the Principal and the Beneficiary from time to time." Thus, if the parties (and particularly the guarantor) do not wish the liability of the guarantor to remain unchanged in spite of the variations to the underlying relationship, they will have to expressly exclude article 6(a).

In relation to the liability of the guarantor, it must be taken into account that the partial performance of the contract or of any of the contractual obligations by the principal does not, in principle, lead to a reduction of the guarantor's liability, always subject to the limitation of the bond amount originally specified. However, the parties may wish to include the possibility of a variation in the bond amount. In order to achieve this, they will have to include a specific clause in the bond, and in particular, will have to stipulate the way in which the amount will be reduced, such as by the issue of a certificate of maintenance or partial performance.

With regard to the beneficiary's claim, if the parties wish default to be established by the production of a certificate by a third party, they must expressly say so, nominating the third party and, if appropriate, giving the third party the power to evaluate the damages to be indemnified. If the third party is not nominated, and the parties do not wish the default to be fixed by the guarantor, they will have to exclude the application of article 7(j)(ii) expressly.

If the parties wish to give the guarantor, rather than the principal, the possibility of choosing between indemnifying and performing, they must also expressly state this choice. The way in which disputes and differences between the beneficiary, the principal, and the guarantor, with regard to the bond, are to be resolved should be specified, and in particular, the application of article 8(b) should be excluded if the parties do not wish to settle their disputes by arbitration.

## II. Conclusions

### A. Prevention of Improper Claims

One of the main advantages that the Uniform Rules for Contract Bonds offer over the URDG is the prevention of improper claims. Effectively, in demand guarantees, since the obligation for the guarantor to pay arises upon the mere claim of the beneficiary, it may demand the amount of the indemnity even though default has not taken place. In this case, the guarantor will still be under an obligation to pay, afterwards being able to exercise its right to reimbursement against the principal. The principal is clearly prejudiced because in spite of having performed the contract correctly, it will have to reimburse the guarantor with the amount of the indemnity.

In contrast, as the Uniform Rules for Contract Bonds require default to have taken place in order to trigger the guarantor's obligation to pay, they avoid having what Spanish judges have termed as "unjustifiable prejudice to the principal" occur.

### B. Flexibility and Simplicity Concerning the Determination of Default

It would, in principle, be possible to conclude that the Uniform Rules for Contract Bonds avoid improper claims at the cost of requiring the beneficiary to provide proof of default, which could interfere enormously with the smooth working of the guarantee, to the detriment of the beneficiary, and could lead to a considerable delay in the payment or satisfaction of its rights.

However, this outcome is actually far from the truth. What these Rules have intended to do, within a delicate balance, is, while preventing improper claims from taking place, to provide a mechanism that allows a rapid procedure for the settlement of claims. This goal has been achieved by the establishment of a series of mechanisms that quickly allow default to be established, the beneficiary thus being able to obtain a prompt satisfaction of its rights. Hence, the Rules, although maintaining the accessory nature of the guarantee, provide the beneficiary who acts in good faith with practically the same advantages as a demand guarantee.

### C. Possibility of Greater Cover

The Uniform Rules for Contract Bonds, apart from giving the beneficiary a protection as effective as that granted by demand guarantees, offer an enormous advantage: they allow a greater cover of the contract or of the guaranteed obligations than do the demand guarantees. International practice shows us that, in demand guarantees, given their greater risk for guarantors, the amount of the cover constitutes a very small percentage of the obligation or obligations guaranteed. However, in accessory guarantees, which have almost no risk of improper claims, the guarantor can offer a much greater cover (from 30 percent upwards).

For all these reasons, and given that the effectiveness and future of the Rules depend on the use that the guarantors and beneficiaries make of them, use of the Rules should be encouraged. The Rules provide a convenient balance between the interests of the contracting parties, without forgetting the need for efficiency, speed, and the satisfaction of the rights of the beneficiary.

APPENDIX

## ICC Uniform Rules for Contract Bonds[17]

### Introduction

These Uniform Rules have been drawn up by an ICC Working Party of members representing the Commission on Insurance and the building and engineering industry for worldwide application in relation to Contract Bonds, being those bonds creating obligations of an accessory nature, where the liability of the Surety or Guarantor arises and is conditional upon an established default on the part of a Contractor (defined in these Rules as the Principal) under the Contract which is the subject matter of the relevant Bond. The Rules set out below will therefore apply where the intention of the parties is that the obligations of the Guarantor will depend upon the duties or liabilities of the Principal under the relevant Contract.

Bonds governed by the ICC Rules set out below are intended to operate so as to confer upon the Beneficiary in each instance security for the performance or execution of contract obligations or payment of any sums which may fall due to the Beneficiary as a result of any breach of obligation or default by the Principal under the Contract. The Bond is intended to ensure that, subject to its financial limits, either the obligations set out in the Contract will be performed or executed, or that upon default, the Beneficiary will recover any sum properly due notwithstanding the insolvency of the Principal or the Principal's failure for any other reason to satisfy or discharge its liability. Accordingly, where a Bond governed by these Rules is in force, the Beneficiary will have the additional assurance of the Guarantor's accessory obligations to ensure that the judgment or award of any competent court or arbitral tribunal is satisfied.

The relationship of the parties under a Bond governed by these Rules differs from that arising under the ICC Uniform Rules for Demand Guarantees number 458 (the Demand Rules). Where the intention is that the Beneficiary is to obtain security for the obligations of the Principal arising pursuant to the Contract but that the Guarantor's liability shall only arise in case of an established default under that Contract, these Rules should be selected.

### General

These Rules are intended to provide a clear and concise scheme to regulate the nature of obligations arising under Bonds and claims procedure. Because the nature of a Bond regulated by these Rules is that the obligations of the parties

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are related directly to and depend upon the obligations of the parties arising under the Contract, the Rules do not contain detailed provisions dealing with documentary requirements or the problem of unfair calling. In the event of a dispute arising as to the liability of a Guarantor, the Rules contemplate that such dispute will be determined by reference to the Contract. The Guarantor and the Principal are protected in that liability will arise only where default is established. The Beneficiary is protected by the assurance that any judgment or award will be discharged by the Guarantor if the Principal fails to do so.

The Uniform Rules for Contract Bonds set out below shall apply where expressly incorporated by the parties in accordance with their detailed provisions. These new Rules depend for their success upon their use by the international business community. The ICC recommends the use of these new Rules which will help to secure uniformity of practice in the operation and enforcement of Bonds.

## Article 1

### Scope and Application

a. These Rules shall be known as the "Uniform Rules for Contract Bonds" and shall apply to any Bond which states that these Rules shall apply, or otherwise incorporates these Rules by reference and, for such purposes, it shall suffice that the Bond incorporates a reference to these Rules and the publication number.
b. If there shall be any conflict in the construction or operation of the obligations of any parties under a Bond between the provisions of these Rules and such Bond, or mandatory provisions of the Applicable Law regulating the same, the provisions of the Bond or, as the case may be, the mandatory provisions of the Applicable Law shall prevail.

## Article 2

### Definitions

In these Rules, words or expressions shall bear the meanings set out below and be construed accordingly.

### Advance Payment Bond

A Bond given by the Guarantor in favour of the Beneficiary to secure the repayment of any sum or sums advanced by the Beneficiary to the Principal under or for the purposes of the Contract, where such sum or sums is or are advanced before the carrying out of works, the performance of services or the supply or provision of any goods pursuant to such Contract.

BENEFICIARY

The party in whose favour a Bond is issued or provided.

BOND

Any bond, guarantee or other instrument in writing issued or executed by the Guarantor in favour of the Beneficiary pursuant to which the Guarantor undertakes on Default, either:

i. to pay or satisfy any claim or entitlement to payment of damages, compensation or other financial relief up to the Bond Amount; or
ii. to pay or satisfy such claim or entitlement up to the Bond Amount or at the Guarantor's option to perform or execute the Contract or any Contractual Obligation.

In either case where the liability of the Guarantor shall be accessory to the liability of the Principal under the Contract or such Contractual Obligation and such expression shall without limitation include Advance Payment Bonds, Maintenance Bonds, Performance Bonds, Retention Bonds and Tender Bonds.

BOND AMOUNT

The sum inserted in the Bond as the maximum aggregate liability of the Guarantor as amended, varied or reduced from time to time or, following the payment of any amount in satisfaction or partial satisfaction of a claim under any Bond, such lesser sum as shall be calculated by deducting from the sum inserted in the Bond the amount of such payment.

CONTRACT

Any written agreement between the Principal and the Beneficiary for the carrying out of works, the performance of services or the supply or provision of any goods.

CONTRACTUAL OBLIGATION

Any duty, obligation or requirement imposed by a clause, paragraph, section, term, condition, provision or stipulation contained in or forming part of a Contract or tender.

DEFAULT

Any breach, default or failure to perform any Contractual Obligation which shall give rise to a claim for performance, damages, compensation or other financial remedy by the Beneficiary and which is established pursuant to paragraph (j) of Article 7.

EXPIRY DATE

Either (a) the date fixed or the date of the event on which the obligations of the Guarantor under the Bond are expressed to expire or (b) if no such date is stipulated, the date determined in accordance with Article 4.

GUARANTOR

Any Person who shall issue or execute a Bond on behalf of a Principal.

MAINTENANCE BOND

A Bond to secure Contractual Obligations relating to the maintenance of works or goods following the physical completion of the provision thereof, pursuant to a Contract.

PERFORMANCE BOND

A Bond to secure the performance of any Contract or Contractual Obligation.

PERSON

Any company, corporation, firm, association, body, individual or any legal entity whatsoever.

PRINCIPAL

Any Person who (i) either (a) submits a tender for the purpose of entering into a Contract with the Beneficiary or (b) enters into a Contract with the Beneficiary and (ii) assumes primary liability for all Contractual Obligations thereunder.

RETENTION BOND

A Bond to secure the payment of any sum or sums paid or released to the Principal by the Beneficiary before the date for payment or release thereof contained in the Contract.

TENDER BOND

A Bond in respect of a tender to secure the payment of any loss or damage suffered or incurred by the Beneficiary arising out of the failure by the Principal to enter into a Contract or provide a Performance Bond or other Bond pursuant to such tender.

WRITING AND WRITTEN

Shall include any authenticated tele-transmissions or tested electronic data interchange (''EDI'') message equivalent thereto.

## Article 3

FORM OF BOND AND LIABILITY OF THE GUARANTOR TO THE BENEFICIARY

a. The Bond should stipulate:
   i. The Principal.
   ii. The Beneficiary.
   iii. The Guarantor.
   iv. The Contract.
   v. Where the Bond does not extend to the whole of the Contract, the precise Contractual Obligation or Obligations to which the Bond relates.
   vi. The Bond Amount.
   vii. Any provisions for the reduction of the Bond Amount.
   viii. The date when the Bond becomes effective (defined in these rules as the ''Effective Date'').
   ix. Whether the Guarantor shall be entitled at its option to perform or execute the Contract or any Contractual Obligation.
   x. The Expiry Date.
   xi. The names, addresses, telex and/or telefax numbers and contact references of the Beneficiary, the Guarantor and the Principal.
   xii. Whether sub-paragraph (i) of Article 7(j) is to apply and the name of the third party to be nominated thereunder for the purpose of Article 7 below (claims procedure).
   xiii. How disputes or differences between the Beneficiary, the Principal and the Guarantor in relation to the Bond are to be settled.
b. The liability of the Guarantor to the Beneficiary under the Bond is accessory to the liability of the Principal to the Beneficiary under the Contract and shall arise upon Default. The Contract is deemed to be incorporated into and form part of the Bond. The liability of the Guarantor shall not exceed the Bond Amount.
c. Save for any reduction of the Bond Amount under the terms of the Bond or the Contract and subject to Article 4, the liability of the Guarantor shall not be reduced or discharged by reason of any partial performance of the Contract or any Contractual Obligation.
d. All defences, remedies, cross claims, counter-claims and other rights or entitlements to relief which the Principal may have against the Beneficiary under the Contract, or which may otherwise be available to the Principal in respect of the subject matter thereof, shall be available to the Guarantor in

respect of any Default in addition to and without limiting any defence under or arising out of the Bond.

## Article 4

RELEASE AND DISCHARGE OF GUARANTOR

a. Subject to any contrary provision in the Bond and the provisions of paragraph (b) of this Article 4, the Expiry Date shall be six months from the latest date for the performance of the Contract or the relevant Contractual Obligations thereunder, as the case may be.
b. Subject to any contrary provision of the Bond, the Expiry Date for the purposes of an Advance Payment Bond, a Maintenance Bond, a Retention Bond and a Tender Bond shall be as follows:
    i. In the case of an Advance Payment Bond, the date on which the Principal shall have carried out works, supplied goods or services or otherwise performed Contractual Obligations having a value as certified or otherwise determined pursuant to the Contract equal to or exceeding the Bond Amount.
    ii. In the case of a Maintenance Bond, six months after either the date stipulated by the Contract or, if no date has been specified for the termination of the Principal's maintenance obligations, the last day of the applicable warranty period or defects liability period under the Contract.
    iii. In the case of a Retention Bond, six months after the date stipulated by the Contract for the payment, repayment or release of any retention monies.
    iv. In the case of a Tender Bond, six months after the latest date set out in the tender documents or conditions for the submission of tenders.
c. Where the Expiry Date falls on a day which is not a Business Day, the Expiry Date shall be the first following Business Day. For the purpose of these Rules "Business Day" shall mean any day on which the offices of the Guarantor shall ordinarily be open for business.
d. A Bond shall terminate and, without prejudice to any term, provision, agreement or stipulation of the Bond, any other agreement or the Applicable Law providing for earlier release or discharge, the liability of the Guarantor shall be discharged absolutely and the Guarantor shall be released upon the Expiry Date whether or not the Bond shall be returned to the Guarantor, save in respect of any claim served in accordance with Article 7.
e. Notwithstanding the provisions of paragraph (d) of this Article 4, the Bond may be cancelled at any time by the return of the Bond itself to the Guarantor or by the service upon and delivery or transmission to the Guarantor of a release in writing duly signed by an authorised representative of the Beneficiary, whether or not accompanied by the Bond and/or any amendment or amendments thereto.

f. The Guarantor shall promptly inform the Principal of any payment made under or pursuant to the Bond and of the cancellation, release or discharge thereof or any reduction in the Bond Amount where the same shall not already have been communicated.

## Article 5

RETURN OF THE BOND

The Bond shall immediately after release or discharge under these Rules be returned to the Guarantor, and the retention or possession of the Bond following such release or discharge shall not of itself operate to confer any right or entitlement thereunder upon the Beneficiary.

## Article 6

AMENDMENTS AND VARIATIONS TO AND OF THE CONTRACT AND THE BOND AND EXTENSIONS OF TIME

a. The Bond shall, subject to the Bond Amount and the Expiry Date, apply to the Contract as amended or varied by the Principal and the Beneficiary from time to time.
b. A Tender Bond shall be valid only in respect of the works and contract particulars set out or described in the tender documents at the Effective Date, and shall not apply beyond the Expiry Date or in any case where there shall be any substantial or material variation of or amendment to the original tender after the Effective Date, unless the Guarantor shall confirm, in the same manner as set out in paragraph (c) of this Article 6, that the Tender Bond so applies or the Expiry Date has been extended.
c. Any amendment to a Bond, including without limitation the increase of the Bond Amount or the alteration of the Expiry Date, shall be in writing duly signed or executed by authorised representatives of each of the Beneficiary, the Principal and the Guarantor.

## Article 7

SUBMISSION OF CLAIMS AND CLAIMS PROCEDURE

a. A claim under a Bond shall be in writing and shall be served upon the Guarantor on or before the Expiry Date and by no later than the close of the Business Day at the Guarantor's principal place of business set out in the Bond, on the Expiry Date.
b. A claim submitted by authenticated tele-transmission, EDI, telex or other means of telefax facsimile or electronic transmission shall be deemed to be received on the arrival of such transmission.
c. A claim delivered to the Guarantor's principal place of business set out in

the Bond shall, subject to proof of delivery, be deemed to be served on the date of such delivery.

d. A claim served or transmitted by post, shall, subject to satisfactory proof of delivery by the Beneficiary, be deemed to be served upon actual receipt thereof by the Guarantor.

e. The Beneficiary shall, when giving notice of any claim by telefax or other tele-transmission or EDI, also send a copy of such claim by post.

f. Any claim shall state brief details of the Contract to identify the same, state that there has been a breach or default and set out the circumstances of such breach or default and any request for payment, performance or execution.

g. Upon receipt of a claim from the Beneficiary, the Guarantor shall send notice in writing to the Principal of such claim as soon as reasonably practicable and before either (a) making any payment in satisfaction or partial satisfaction of the same or (b) performing the Contract or any part thereof pursuant to a Contractual Obligation.

h. The Beneficiary shall, upon written request by the Guarantor, supply to the Guarantor such further information as the Guarantor may reasonably request to enable it to consider the claim, and shall provide copies of any correspondence or other documents relating to the Contract or the performance of any Contractual Obligations and allow the Guarantor, its employees, agents or representatives to inspect any works, goods or services carried out or supplied by the Principal.

i. A Claim shall not be honoured unless
   i. A Default has occurred; and
   ii. The claim has been made and served in accordance with the provisions of paragraphs (a)-(f) of Article 7 on or before the Expiry Date.

j. Notwithstanding any dispute or difference between the Principal and the Beneficiary in relation to the performance of the Contract or any Contractual Obligation, a Default shall be deemed to be established for the purposes of these Rules:
   i. upon issue of a certificate of Default by a third party (who may without limitation be an independent architect or engineer or a Pre-Arbitral referee of the ICC) if the Bond so provides and the service of such certificate or a certified copy thereof upon the Guarantor, or
   ii. if the Bond does not provide for the issue of a certificate by a third party, upon the issue of a certificate of Default by the Guarantor, or
   iii. by the final judgment, order or award of a court or tribunal of competent jurisdiction, and the issue of a certificate of Default under paragraph (i) or (ii) shall not restrict the rights of the parties to seek or require the determination of any dispute or difference arising under the Contract or the Bond or the review of any certificate of Default or payment made pursuant thereto by a court or tribunal of competent jurisdiction.

k. A copy of any certificate of Default issued under (j)(i) or (ii) shall be given by the Guarantor to the Principal and the Beneficiary forthwith.
l. The Guarantor shall consider any claim expeditiously and, if such claim is rejected, shall immediately give notice thereof to the Beneficiary by authenticated tele-transmission or other telefax, facsimile transmission, telex, cable or EDI, confirming the same by letter, setting out the grounds for such refusal including any defences or other matters raised under paragraph (d) of Article 3.

## Article 8

JURISDICTION AND SETTLEMENT OF DISPUTES

a. The Applicable Law shall be the law of the country selected by the parties to govern the operation of the Bond and, in the absence of any express choice of law, shall be the law governing the Contract and any dispute or difference arising under these Rules in relation to a Bond shall be determined in accordance with the Applicable Law.
b. All disputes arising between the Beneficiary, the Principal and the Guarantor or any of them in relation to a Bond governed by these Rules shall, unless otherwise agreed, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
c. If the Bond shall exclude the operation of the arbitration provisions of this Article 8, any dispute between the parties to the Bond shall be determined by the courts of the country nominated in the Bond, or, if there is no such nomination, the competent court of the Guarantor's principal place of business or, at the option of the Beneficiary, the competent court of the country in which the branch of the Guarantor which issued the Bond is situated.